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5-23-08

No. 07-618

In the Supreme Court of the United States

GOSS INTERNATIONAL CORPORATION, PETITIONER

v.

TOKYO KIKAI SEISAKUSHO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the satisfaction of a money judgment divests a federal district court of subject matter jurisdiction to maintain an antisuit injunction designed to prevent the losing party from seeking to reverse the results of that judgment.

2. Whether the court of appeals erred in concluding that a foreign antisuit injunction was not warranted in the circumstances of this case.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Petitioner is a United States corporation that manufactures printing presses and related equipment. Respondents are a Japanese corporation and its United States subsidiary. Pet. App. 87a, 89a.

In 2000, petitioner sued respondents under Title VIII of the Revenue Act of 1916 (1916 Act), ch. 463, 39 Stat. 798 (repealed 2004), which at the time created a private cause of action against parties who unlawfully "dumped" imported goods into the United States. On December 3, 2003, a jury found for petitioner and awarded $10,539,949 in damages, which the district

court trebled as provided in the 1916 Act. The final judgment, including costs and attorney's fees, exceeded $35 million. Pet. App. 4a-5a. That judgment was affirmed on appeal, *id.* at 87a-126a, and this Court denied certiorari. No. 05-1358 (June 5, 2006).

2. The United States is a member of the World Trade Organization (WTO), an international organization that administers certain trade agreements (collectively, WTO Agreement) and handles disputes between WTO Members arising out of the WTO Agreement. Japan and the European Communities (EC) are also Members of the WTO. Pet. App. 5a n.3.

In November 1998, the EC asked the WTO's Dispute Settlement Body (DSB) to convene a dispute settlement panel to consider whether the 1916 Act was inconsistent with the WTO Agreement. Japan made a similar request, and the DSB established panels to review the complaints. Pet. App. 5a n.3.

Both dispute settlement panels concluded that the 1916 Act was inconsistent with the WTO Agreement and that benefits accruing to the EC and Japan under that Agreement had been nullified or impaired by the United States, and recommended that the DSB request that the United States "bring the 1916 Act into conformity with its obligations under the WTO Agreement." Pet. App. 5a n.3. The panel considering Japan's complaint also "suggest[ed] that one way for the United States to" do so "would be to repeal the 1916 Act." Panel Report, *United States—Anti-Dumping Act of 1916*, ¶ 6.292, WT/DS162/R (May 29, 2000). The United States appealed the panels' reports to the WTO Appellate Body, which upheld the panels' determinations. Appellate Body Report, *United States—Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28,

2000). On September 26, 2000, the DSB adopted the Appellate Body report and the panel reports as upheld by it. Dispute Settlement Body Action, *United States—Anti-Dumping Act of 1916*, WT/DS136/8, WT/DS162/11 (Oct. 2, 2000).

Legislation that would have repealed the 1916 Act and terminated cases pending under it was introduced on December 20, 2001, but not enacted. H.R. 3557, 107th Cong., 1st. Sess. On January 7, 2002, the EC and Japan separately requested WTO authorization to suspend concessions in order to enact their own legislation mirroring the 1916 Act with respect to imports from the United States. Recourse by the European Communities to Article 22.2 of the DSU, *United States—Anti-Dumping Act of 1916*, WT/DS136/15 (Jan. 11, 2002); Recourse by Japan to Article 22.2 of the DSU, *United States—Anti-Dumping Act of 1916*, WT/DS161/18 (Jan. 10, 2002). The United States objected to those proposals, and they were referred to arbitration. H.R. Rep. No. 415, 108th Cong., 2d Sess. 5 (2003) (*House Report*). On March 4, 2002, both arbitrators agreed to suspend arbitration pending efforts to resolve the disputes. Arbitrator Communication, *United States—Anti-Dumping Act of 1916*, WT/DS162/21 (Japan); Arbitrator Communication, *United States—Anti-Dumping Act of 1916*, WT/DS136/18 (EC). Legislation that would have repealed the 1916 Act and terminated cases pending under it was introduced on April 23, 2002, S. 2224, 107th Cong., 2d Sess., and on May 23, 2003, S. 1155, 108th Cong., 1st. Sess., but neither bill was enacted.

In September 2003, the EC requested resumption of arbitration regarding its request to suspend concessions. Arbitrators Communication, *United States—Anti-Dumping Act of 1916*, WT/DS136/19 (Sept. 29,

2003). In December 2003, the European Union (EU) approved a regulation banning the recognition and enforcement in EU countries of judgments rendered under the 1916 Act, and authorizing EU-based companies and citizens to claim damages for penalties assessed under the 1916 Act. *House Report* 5. On February 24, 2004, the arbitrators in the EC proceeding approved the suspension by the EC of concessions to the United States, but only in an amount equal to the total of any final judgments for, and settlements of, claims under the 1916 Act. Arbitrators Decision, *United States—Anti-Dumping Act (Original Complaint by the European Communities)*, ¶¶ 8.1, 8.2, WT/DS136/ARB. At that time, the 1916 Act remained in force. Unlike the EC, Japan never reactivated its separate WTO arbitration proceeding.[1]

On December 3, 2004, the President signed legislation repealing the 1916 Act. Miscellaneous Trade and Technical Corrections Act of 2004 (2004 Act), Pub. L. No. 108-429, § 2006(a), 118 Stat. 2597. The 2004 Act expressly provides that the repeal "shall not affect any action * * * that was commenced before the date of the enactment of this Act and is pending on such date." § 2006(b), 118 Stat. 2597.[2] A committee report prepared

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[1] The court of appeals' opinion mistakenly states that Japan also reactivated its separate WTO proceedings, and could be read to suggest (incorrectly) that the February 2004 decision was issued in connection with the Japanese proceeding as well as the EC proceeding. Pet. App. 6a n.3.

[2] The United States made no "repeated promises" (Br. in Opp. 6) that any repeal of the 1916 Act would cover this case. The document partially quoted on page 6 of the brief in opposition states that "[t]he representative of the United States" had reported that "the proposed legislation H.R. 3557 had been introduced in the US Congress which would repeal the 1916 Act and provide that no judgments pursuant to the actions under such Act shall be entered on or after 26 September

in connection with the 2004 Act expressly references this litigation—which it describes as the only "pending case brought under the Antidumping Act of 1916"—and notes that the jury had reached its verdict two months before the report was released. *House Report* 2 n.2.

The House Report states that "[s]everal factors strongly favor[ed]" a prospective-only repeal of the 1916 Act. *House Report* 5. It explains that "WTO decisions are not self-executing," and that "[a]utomatic adherence to WTO decisions undermines the legislative prerogatives of Congress and the sovereignty of the United States." *Ibid.* The House Report further notes that "both the Administration and Congress have consistently taken the position that retroactive repeal is not necessary to ensure compliance with our WTO obligations in all cases, particularly those pertaining to U.S. trade remedy laws." *Ibid.* Accordingly, because "the justification for repealing the 1916 Act [was] to bring the United States into compliance with its present WTO obligations," the House Report states that "conforming legislation should not extend to retroactive repeal." *Ibid.*; see *id.* at 17 n.19 (dissenting views) (stating that "[r]etroactive repeal is not required by WTO practice or pre-

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2000." Meeting Minutes, *Dispute Settlement Body, 8 March 2002*, ¶ 8, WT/DSB/M/121 (Apr. 3, 2002). That statement was an accurate description of the relevant bill. The minutes also state that "[t]he United States was continuing to work with the EC to find a mutually satisfactory solution to this dispute," *ibid.*, but there is no indication that the United States "promise[d]" that any legislation would cover this case. The document cited on page 18 of the brief in opposition quotes a joint communication stating accurately that "a proposal to repeal the 1916 Act and to terminate cases pending under the Act is currently being examined by the US Congress." Arbitrator Communication, *United States—Anti-Dumping Act of 1916*, WT/DS162/21 (Mar. 4, 2002).

cedent, and it has been argued that it would set a bad precedent for other WTO disputes").

3. On December 8, 2004, the Japanese legislature enacted a law whose title the lower courts translated as "The Special Measures Law concerning the Obligation to Return Profits Obtained pursuant to the Antidumping Act of 1916 of the United States, etc., Law No. 162, 2004" (Special Measures Law). Pet. App. 3a, 63a.[3] Article 6 of the Special Measures Law expressly provides that any final judgment entered in a foreign court under the 1916 Act "shall," depending on the translation, "be invalid," Pet. 4, or "not have any effect," Resp. C.A. App. 78. The Special Measures Law further provides that a party that obtains a final judgment under the 1916 Act against a Japanese national "shall reimburse such benefits with interest" and must also "indemnify" the Japanese party's attorney's fees in the United States proceedings. Pet. 3; see Resp. C.A. App. 77. Finally, the Special Measures Law imposes joint and several liability on any parent or wholly owned subsidiary of the party that obtained the judgment under the 1916 Act. Pet. 3-4; Resp. C.A. App. 77.

4. a. Respondents agreed not to file an action under the Special Measures Law until their appeals from the underlying merits judgment were exhausted, and to give petitioner 14 days' notice before doing so. Respondents gave the required notice on June 5, 2006, the same day this Court denied their petition for a writ of certiorari. In response, petitioner sought injunctive relief barring respondents from enforcing the Special Measures Law. Pet. App. 64a-65a.

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[3] The parties were unable to agree on an English translation of the Special Measures Law, Pet. 3 n.1, and the district court made no findings regarding the matter.

b. The district court entered a preliminary injunction barring respondents or "anyone acting in concert with them * * * from * * * assert[ing] or pursu[ing] any rights or remedies granted under the Japanese Special Measures Law." Pet. App. 84a. The court described it as "settled * * * that a foreign anti-suit injunction is only appropriate if the foreign litigation involves the same issues and parties as the federal action and if the federal action is dispositive of the foreign litigation." *Id.* at 74a. The district court found that "threshold" requirement satisfied because "the sole basis for [petitioner's] liability under the Japanese Special Measures Law is [petitioner's] receipt of damages awarded by this court." *Id.* at 74a-75a.

The district court next observed that "there is presently a circuit split" concerning "how much weight the court should give to considerations of international comity" before entering a foreign antisuit injunction. Pet. App. 75a. The court found it unnecessary to resolve that question, because it concluded that petitioner had "met its burden" under any of the existing standards. *Id.* at 76a. The court stated that "[e]ven among those courts that afford international comity the greatest respect, it is settled that considerations of comity have diminished force when, as here, one court has already reached judgment." *Ibid.* It also described respondents' intent to invoke the Special Measures Law as "a direct attack on this Court's judgment in favor of [petitioner] and a frontal assault on the jurisdiction of this court," because the "sole purpose" of such a suit would be to "undo six years of federal court litigation." *Id.* at 78a (internal quotation marks and citation omitted). The district court acknowledged that an injunction "would be deeply offensive to the Japanese government" and "may have international

repercussions." *Id.* at 78a-79a. But it determined that an injunction was "consistent with the decisions of the legislative and executive branches of the United States," which had "deliberately chose[n]" to make the repeal of the 1916 Act purely prospective and had done so despite knowing that the Japanese government considered the judgment in this case to be "in violation of the United States' obligations as a member of the [WTO]." *Id.* at 79a.

c. After the district court entered the preliminary injunction, respondents paid the underlying judgment, and the district court entered a satisfaction of judgment. Shortly thereafter, respondents appealed. Pet. App. 3a.

5. Citing "changed circumstances since the district court entered its preliminary injunction," Pet. App. 3a, the court of appeals vacated the preliminary injunction and remanded with instructions to dismiss petitioner's request for injunctive relief, *id.* at 1a-29a. The court first endorsed "the 'conservative approach' under which a foreign antisuit injunction will issue only if the movant demonstrates (1) an action in a foreign jurisdiction would prevent United States jurisdiction or threaten a vital United States policy, and (2) the domestic interests outweigh concerns of international comity." *Id.* at 8a.

The court of appeals determined that "[t]he case before us does not fit within the category of cases in which foreign antisuit injunctions have been considered." Pet. App. 19a-20a. The court "[f]irst" concluded that neither the All Writs Act, 28 U.S.C. 1651(a), nor the doctrine of ancillary jurisdiction "provides the district court with a separate source of jurisdiction to enjoin [respondents] under these circumstances." Pet. App. 20a, 22a. The Eighth Circuit noted that "the judgment is now rendered, paid, and satisfied," and that "[n]o pending litiga-

tion, other than this appeal, remains in the United States courts." *Id.* at 22a. The court also stated that "the request for injunctive relief is not for the prevention of interdictory jurisdiction by Japanese courts," and that "United States courts are being asked to prevent [petitioner] from seeking a remedy available solely in Japan." *Ibid.*

The court of appeals' "[s]econd" determination was that "once one court reaches a final judgment, the role of comity for antisuit injunction purposes essentially is moot because there is no longer tension with the foreign court over *concurrent* jurisdiction." Pet. App. 22a. Instead, "the doctrine of res judicata should apply as a defense to further litigation of the same issues." *Ibid.* The court of appeals reasoned that in this case "[t]he issues previously decided below * * * are different from the issues sought to be litigated in the foreign jurisdiction," because respondents seek "to litigate in Japan a cause of action solely available in Japan and not previously litigated in the antidumping litigation." *Id.* at 23a.

The court of appeals' "[t]hird" conclusion was that the district court had erred in assessing the impact of respondents' proposed suit on United States public policy. Pet. App. 23a. It "disagree[d] with" the district court's view that Congress's decision to repeal the 1916 Act in a prospective-only fashion "may play a role" in that determination, observing that the *House Report* indicates that Congress was aware of the "blocking" regulation that had already been enacted by the EU at the time of the repeal. *Id.* at 23a-24a. It also concluded that the district court had "placed too much emphasis on the impact of the Special Measures Law," noting that petitioner "received the only judgment ever granted under"

the "now-defunct 1916 Act," and opined that "the United States representative to the WTO may seek to enforce provisions of the WTO Agreement to prevent [respondents] from enforcing the Special Measures Law." *Id.* at 24a.

The court of appeals was "profoundly aware" that a judgment under the Special Measures law "would effectively nullify the remedy [petitioner] legitimately procured in the United States courts," but stated that such a result "does not threaten United States jurisdiction or any current United States policy." Pet. App. 25a. The court acknowledged that the Special Measures Law could itself "be regarded as an affront to the laws and judicial rules of the United States," *id.* at 26a, but concluded that "[a]ny response by the United States * * * must come through authorized representatives of the United States Executive or Legislative Branches," *id.* at 27a.

6. Following the court of appeals' decision, respondents commenced an action under the Special Measures Law in the Japanese courts against petitioner and its Japanese subsidiary. Pet. 11.

DISCUSSION

The court of appeals' analysis was flawed in several respects. Most fundamentally, the court erred in concluding that an action under the Special Measures Law would not involve the same issues that were previously resolved in the now-final federal court litigation. And if the court of appeals' decision is properly interpreted as holding that the satisfaction of a money judgment divests a district court of subject matter jurisdiction to maintain an antisuit injunction *regardless* of whether the second suit would involve the same issues as the first

one, it erred in that respect as well. Finally, the court of appeals erred in its comity analysis. It erroneously assessed the significance of Congress's decision to repeal the 1916 Act—and to do so in a prospective-only manner—for purposes of determining whether an action under the Special Measures Law would be inconsistent with United States public policy.

On balance, however, further review is not warranted. This case involves an unusual set of circumstances that are unlikely ever to recur, and the central errors in the court of appeals' analysis involve threshold issues that are, at present, unique to this particular case. As a result, this case presents a less-than-ideal vehicle for any broad consideration of the standards that federal courts should use in determining whether to enjoin a party from pursuing litigation in a foreign tribunal. Finally, although the Eighth Circuit's jurisdictional holding may conflict with the Second Circuit's analysis in *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111 (2007), petition for cert. pending, No. 07-619 (filed Nov. 8, 2007) (*Pertamina*),[4] the scope of any conflict is narrow and uncertain and involves an issue that does not appear to arise frequently.

A. The Court Of Appeals' Analysis Was Erroneous In Several Respects

1. As the district court explained, even courts of appeals that disagree about the role and significance of international comity in determining whether a foreign antisuit injunction should be issued generally agree that a "threshold question" is whether "the foreign litigation

[4] Subsequent citations will be to the appendix to the petition for a writ of certiorari in *Pertamina* (*Pertamina* Pet. App.).

involves the same issues and parties as the federal action." Pet. App. 74a-75a (citing cases); see *Pertamina* Pet. App. 39a-40a; cf. *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 147 (1988) (stating that a federal court may enjoin state court litigation "of an issue that previously was presented to and decided by the federal court"). In reversing the district court's grant of preliminary injunctive relief, the court of appeals appears to have relied heavily on its conclusion that "[t]he issues previously decided below in the district court are different from the issues sought to be litigated in the foreign jurisdiction." Pet. App. 23a. That case-specific conclusion is erroneous.

The court of appeals correctly observed that the "cause of action" that respondents wish to litigate, as well as the "remedy" they seek, are available only in Japan. Pet. App. 22a-23a. It does not necessarily follow, however, that the two cases do not involve the same "issues" in the relevant sense. The fundamental issues resolved in the completed United States proceedings were (1) whether petitioner was entitled to be compensated for respondents' conduct in allegedly "dumping" printing-press equipment in the United States, and (2) if so, the amount of such compensation. The final judgment in that litigation conclusively resolved those issues in favor of petitioner. The litigation commenced by respondents in Japan under the Special Measures Law effectively seeks to relitigate those issues, albeit under Japanese law rather than United States law, in order to achieve a different (and directly contrary) result.

It is true that an action under the Special Measures Law would not permit respondents to relitigate the underlying factual questions, or whether governing United States law imposed liability under such circumstances.

Pet. App. 23a. But that is because the Special Measures Law makes the very existence of a final satisfied judgment under the 1916 Act the *basis* for imposing liability in the amount of the United States judgment. Pet. 3; Resp. C.A. App. 77. Accordingly, the Special Measures Law represents an even more direct attack on a final federal judgment than would a mere attempt to relitigate the underlying factual matters. The district court was therefore correct in concluding as a threshold matter that an antisuit injunction was a potentially available remedy. See *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 239 (1934) (stating that a federal court retains authority to "preserve the fruits and advantages of a judgment or decree rendered therein").

2. The scope of the court of appeals' holding regarding a federal court's power to maintain an antisuit injunction following satisfaction of an underlying judgment is unclear. There is language in the court's opinion that could be viewed as limiting its holding to situations in which the issues to be litigated, or the remedies that would be sought, in the second proceeding are different from those in the earlier proceeding. Thus, the court of appeals noted that "United States courts are being asked to prevent [respondents] from seeking a remedy available solely in Japan," and quoted this Court's statement that it has "cautioned against the exercise of jurisdiction over proceedings that are 'entirely new and original,' or where 'the relief [sought is] of a different kind or on a different principle' than that of the prior decree." Pet. App. 22a (quoting *Peacock* v. *Thomas*, 516 U.S. 349, 358 (1996) (brackets in original; citations omitted)). As discussed, the court then concluded (albeit erroneously) that the issues decided in the original federal action "are different from the issues sought to be litigated in the

foreign jurisdiction." *Id.* at 23a. And the court emphasized that its jurisdictional holding applied under "these circumstances" and "the facts of this case." *Id.* at 22a, 29a.

On the other hand, the court of appeals' decision can also plausibly be read as stating that a federal court lacks jurisdiction to maintain an antisuit injunction if its judgment awarded only monetary relief and the judgment has been fully satisfied. The court began the relevant discussion by stating that "the district court retained ancillary enforcement jurisdiction *until* satisfaction of the judgment," Pet. App. 21a, and emphasized that "the judgment now is rendered, paid, and satisfied," and that "[n]o pending litigation, other than this appeal, remains in the United States courts," *id.* at 22a. The court of appeals determined that it "need not decide whether the district court abused its discretion in issuing the preliminary antisuit injunction," but the only "changed" circumstance it referenced was its view that "there is no longer an outstanding judgment to protect." *Id.* at 28a. Finally, although the court of appeals "reach[ed] no categorical conclusion regarding the propriety of the issuance of an antisuit injunction in all cases involving the preservation of a judgment," the reason it gave for not doing so was because "there are cases where the satisfaction of judgment is not * * * solely the payment of a money judgment." *Id.* at 29a n.9.

To the extent that the court of appeals' jurisdictional holding is dependent upon the court's conclusion that the issues to be litigated in the Japanese proceeding are not the same as those that were previously litigated in the United States, that holding is flawed for the reasons already explained. See pp. 12-13, *supra*. And if the court of appeals held that a federal court lacks jurisdic-

tion to maintain an antisuit injunction in *any* situation once a purely money judgment has been fully satisfied, that holding would be erroneous for the reasons explained in the government's brief in *Pertamina*. Gov't Amicus Br. at 10-13, *Pertamina*, *supra* (No. 07-619). Moreover, this case would be an apt illustration for why such a categorical approach would be incorrect. In this case satisfaction of the judgment in the United States court was a condition precedent for the Japanese cause of action designed to countermand the effect of the United States proceeding. In these circumstances, treating satisfaction of the judgment as precluding an antisuit injunction ignores reality.

3. The court of appeals also erred in declining to give any weight in its public-policy analysis to "Congress's decision to repeal the 1916 Act prospectively, rather than retroactively." Pet. App. 23a. To be sure, Congress' decision to repeal the 1916 Act was "clearly [a] response to the WTO proceedings." *Ibid.* But neither that fact, nor the fact that the authors of the House Report were aware of the "blocking" regulation that had already been issued by the EU, *id.* at 24a, nor the fact that petitioner received the only judgment ever granted under the 1916 Act, *ibid.*, nor the existence of potential diplomatic avenues for reacting to the Special Measures Law, *id.* at 24a, 27a, is dispositive of the comity question here.

Subject to the constraints imposed by the Constitution, the public laws enacted by Congress embody, by definition, the public policy of the United States. The 1916 Act was a validly enacted federal law. And when Congress repealed that law in 2004, it made an express determination that the repeal would not apply to cases, including this one, that had been filed before the repeal.

See pp. 4-6, *supra*. It is the position of the United States that the prospective repeal of the 1916 Act brought the United States into conformity with the DSB's recommendations and rulings in the disputes with Japan and the EC over the 1916 Act. The court of appeals therefore erred in failing to recognize that Congress's decision to repeal the 1916 Act in a manner that preserved the judgment in this case is *itself* "United States policy" entitled to "play a role in the decision to grant a foreign antisuit injunction." Pet. App. 23a. Moreover, once Congress's express intent to give the repeal only prospective effect is recognized, the fact that this was the only pending case of which Congress was aware strengthens, rather than undermines, the case for an injunction.

Relatedly, the court of appeals also erred in giving seemingly dispositive weight to its view that "international comity must allow the Japanese courts, in the first instance, to determine the enforceability of the Special Measures Law." Pet. App. 24a. As a law specifically designed to overturn a final judgment entered by a court that clearly possessed jurisdiction and was implementing the law of its nation with respect to conduct and harm occurring within the territorial jurisdiction of that nation, the Special Measures Law is itself in considerable tension with general notions of international comity, and thus should not have received full weight in the comity analysis. See *Laker Airways Ltd.* v. *Sabena*, 731 F.2d 909, 931, 937 (D.C. Cir. 1984).

B. Further Review Is Not Warranted

For the reasons explained above, the court of appeals' analysis was flawed in several respects. On bal-

ance, however, the unique and case-specific nature of the dispute counsels against further review.

1. The first question presented involves at most a narrow issue: whether satisfaction of a money judgment divests a district court of jurisdiction to maintain an antisuit injunction. As explained (see pp. 13-14, *supra*), it is unclear whether the court of appeals' jurisdictional holding depends on its erroneous view that the issues in the second proceeding differ from those in the completed federal proceeding. If so, the decision below essentially amounts to a flawed case-specific determination that the Japanese lawsuit differs in material respects from the completed United States adjudication, a determination that would not conflict with the Second Circuit's jurisdictional holding in *Pertamina*, which is expressly limited to injunctions barring "relitigat[ion of] issues in a non-federal forum that were already decided in federal court." *Pertamina* Pet. App. 38a. On the other hand, if the Eighth Circuit's decision holds that a federal court lacks jurisdiction to maintain an antisuit injunction whenever the underlying judgment was solely for money and has been fully satisfied, there would be a direct conflict between that decision and *Pertamina*. See *ibid.* (holding that "federal courts have continuing jurisdiction" to "enjoin a party properly before them from relitigating issues in a non-federal forum," "even after a judgment has been satisfied").

In any event, the potential conflict between *Pertamina* and the decision below does not merit further review at this time. Any conflict is of recent vintage and involves only two circuits. The parties have cited no other appellate decisions addressing the narrow question of ancillary jurisdiction at issue here, which suggests that the issue arises only infrequently. Moreover,

it remains to be seen whether the Eighth Circuit will apply the jurisdictional rule announced in this case even when, unlike here, the court concludes that the action to be enjoined constitutes an attempted re-litigation of the earlier suit. And the Eighth Circuit's holding that the issues decided in the federal litigation "are different from the issues sought to be litigated in the foreign jurisdiction" (Pet. App. 23a), while quite erroneous, is necessarily case-specific and does not itself warrant further review.

2. a. The second question presented involves the standards that federal courts should use in determining whether to enjoin parties from litigating in foreign courts. Although the courts of appeals have enunciated different verbal formulations of the proper test, it appears that all of them give weight to comity concerns, and it is not clear that the different formulations have actually produced different results in cases with comparable facts. See, *e.g.*, *E. & J. Gallo Winery* v. *Andina Licores S.A.*, 446 F.3d 984, 995 (9th Cir. 2006) (stating that although "[t]here may be different views among circuits as to the relative importance to be given to comity in deciding whether to file an anti-suit injunction," it was unnecessary to "express [an] opinion on these possible differences" because "in this case, an anti-suit injunction would be appropriate under any test"); *Philips Med. Sys. Int'l B.V.* v. *Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993) (declining to "make a definitive choice" regarding the proper standard "or even decide whether the differences between the standards are more than verbal, that is, whether they ever dictate different outcomes," because an injunction was warranted "even under the more demanding standard").

Even assuming that the different formulations will produce materially different outcomes, moreover, this case does not appear to be a suitable vehicle for choosing among them. The unusual procedural and factual background of this case presents issues that are unlikely ever to recur. The Special Measures Law is expressly limited to judgments obtained against Japanese nationals under the 1916 Act, and the United States is not aware of any remaining cases pending under the 1916 Act. Before this case, no court had been asked to consider the weight of United States public policy in protecting the effectiveness of judgments obtained under the 1916 Act, and no court will ever be asked to do so again. In addition, because the court of appeals' analysis of the comity issues was so closely tied to the circumstances of this particular case—including the court's erroneous threshold determination (Pet. App. 23a) that a suit under the Special Measures Law would present different issues from those resolved in the already-completed federal proceeding, and the court's misplaced reliance (*id.* at 23a-25a) on the congressional repeal of the 1916 Act—it is questionable whether this Court's review would generate a precedent of general significance.

b. Petitioner suggests (Pet. 26-28) that further review is necessary because of the existence of other clawback statutes and the prospect that foreign governments could enact others. The United Kingdom has a clawback statute that provides recovery for the noncompensatory portion of any antitrust award, Protection of Trading Interests Act, 1980, c. 11, § 6.2 (1980), and other nations have enacted clawback legislation with respect to certain judgments obtained under United States antitrust laws as well. See Foreign Extraterritorial Measures Act,

R.S.C., ch. F-29, §§ 8-9 (Can. 1985); Foreign Proceedings (Excess of Jurisdiction) Act, 1984, No. 3, § 10 (Austl.). Foreign governments have also enacted clawback statutes aimed at laws such as the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (22 U.S.C. 6021 *et seq.*), and the Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541. See, *e.g.*, Council Regulation 2271/96, art. 6, 1996 O.J. (L 309) 39 (EU).

Notwithstanding the existence of those statutes, the United States is unaware of any other application of a foreign clawback statute against the United States in recent years, and it is not clear to what extent such cases will arise in the future. Moreover, clawback statutes pose sensitive diplomatic, as well as legal, questions. See United States Embassy, London, England, Diplomatic Note No. 56, 21 I.L.M. 840, 843 (Nov. 9, 1979) (stating that the then-proposed Protection of Trading Interests Act "raises serious questions under the very principles of international law and comity to which Her Majesty's Government is committed"). In addition, the fact that the Special Measures Law is a response to a United States law that has been repealed, and that the WTO found to be inconsistent with the WTO Agreement, may diminish the extent to which further review here would likely provide a useful precedent for future disputes. Accordingly, it would be preferable for this Court to await a case involving a clawback statute aimed at a federal law in which the United States retains an ongoing enforcement interest.

c. Petitioner asserts that the court of appeals held that "because the judgment was final and satisfied, concerns about protecting the judgment were insufficient to outweigh comity," and that this holding "creates addi-

tional conflict among the circuits over the weight to be accorded to comity once a final judgment is entered in the United States." Pet. 24-25 (citing Pet. App. 26a). Petitioner is correct that the lower courts have generally concluded that international "comity carries less weight" once a court has rendered a final judgment. Pet. 24. It is far from clear, however, that the Eighth Circuit enunciated a rule of law that conflicts with the decisions of other courts in that respect.

Petitioner does not identify the language in the opinion below that gives rise to the alleged conflict, but may be referring to the court of appeals' statement that because "the present case involves no pending litigation between the parties * * * in the United States" an antisuit injunction "is beyond our limited jurisdiction and contrary to principles of comity." Pet. App. 26a. That language does not clearly hold that the Eighth Circuit accords more weight to international comity in the final-judgment context. To the contrary, the court earlier stated that "once one court reaches a final judgment, the role of comity for antisuit injunction purposes essentially is *moot*," and that, in such circumstances, "the doctrine of res judicata should apply as a defense to further litigation of the same issues." *Id.* at 22a (emphasis added). Whatever the merit of that statement, it is difficult to reconcile with petitioner's characterization of the court's holding. Thus, the court's reliance on the absence of pending litigation is perhaps best understood as a reflection of its earlier (erroneous) conclusion that preclusion principles "are inapplicable here" because "[t]he issues previously decided below in the district court are different from the issues sought to be litigated in the foreign litigation." *Id.* at 23a. For that reason, the court below did not clearly reject the "settled" rule

that "considerations of comity have diminished force when, as here, one court has already reached final judgment." Pet. App. 76a.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] If the Court nonetheless concludes that certiorari is warranted with respect to one or both of the questions presented, the government submits that this case would present a better vehicle than *Pertamina*. First, *Pertamina* has an extremely complicated procedural background involving arbitration, litigation in numerous foreign countries, and multiple decisions by two different courts of appeals, and it implicates the sovereign interests of at least four different jurisdictions. This case, in contrast, has a more straightforward procedural history, and principally involves only the United States and Japan. Second, the Second Circuit's decision in *Pertamina* is correct, whereas the analysis of the court below was erroneous in several respects.